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BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

In re Amendment of Section 73.202(b))	
of the Commission's Rules, Table of Allotments.)	MM Docket No. 02-12
FM Broadcast Stations)	RM-10356, RM-10551, RM-10552.
(ASH FORK ET AL., ARIZONA))	RM-10554, and RM-10554

To, The Office of the Secretary
To the Attention of: The Assistant Chief, Audio Division, Media Bureau

PETITION FOR RECONSIDERATION

NPR PHOENIX, LLC	PRESCOTT RADIO PARTNERS
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DATE DECEMBER 19, 2003	

No. of Cases rec'd 0 + 5
List ABCDEF

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SUMMARY

By means of this submission, NPR Phoenix, LLC (*NPR*), the licensee of station KEDJ, Channel 280C2, Gilbert, Arizona, and Prescott Radio Partners (*PRP*), the licensee of station KFPB(FM), Channel 280C3, Chino Valley, Arizona, hereby jointly seek reconsideration of the failure of the November 26, 2003 Report and Order in this docket (the R&O) to implement the timely proposed: (a) shift of station KFPB to Channel 232C3 at a new site (the *Chino Valley Channel Substitution*); and (b) upgrade of station KEDJ to Channel 280C1 (the *Gilbert Upgrade*)

The R&O held that the Gilbert Upgrade was not a true Counterproposal in this proceeding and that the Chino Valley Channel Substitution was unnecessary in light of the other actions the R&O took. That holding constitutes error which must be reversed. The Chino Valley Channel Substitution and Gilbert Upgrade were integral components of a multi-element Counterproposal that NPR timely filed in this docket. As such, and as elements of a “daisy chain” of timely filed conflicting proposals, they acquired both “protected status” and the right to implementation in this proceeding.

The fact that NPR and Spectrum Scan, LLC, another Counterproponent, achieved a Global Resolution of all mutual exclusivities in this proceeding provides no basis for failing to accord the Chino Valley Channel Substitution and Gilbert Upgrade the “protected status” and the favorable consideration to which they were and are legally entitled.

The R&O resulted in the unlawful disparate treatment of NPR’s and Spectrum Scan’s respective Counterproposals. The R&O also acted in contravention of several decades of “cutoff” law, of two decades of allotment procedure, and in contravention of Paragraph 3 of the

Notice of Proposed Rule Making in this very same proceeding. Further, relative to an Order issued just four months earlier in this very same proceeding, the R&O also reached a diametrically opposite conclusion on the critical question of whether the Gilbert Upgrade was a valid Counterproposal in this docket. The R&O, however, provided no explanation for why the staff deemed the Gilbert Upgrade as a valid Counterproposal on July 24, but not one on November 26. The R&O's conclusion on this question also does not square with actions routinely taken in many other proceedings.

For all these reasons, the staff must immediately issue a Memorandum Opinion and Order correcting the R&O and implementing the Chino Valley Channel Substitution and Gilbert Upgrade in this proceeding

Finally, NPR and PRP take the opportunity to point out that, even though the R&O correctly rejected as untimely a Counterproposal for Channel 222C2 at Tusayan, Arizona, the licensee of the Tusayan station can achieve a Class C2 upgrade on Channel 222 simply by filing a one-step-upgrade application on the effective date of the R&O (January 12, 2004)

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JOINT PETITION FOR RECONSIDERATION

NPR Phoenix, LLC (*NPR*), the licensee of station KEDJ, Channel 280C2, Gilbert, Arizona, Facility ID No. 54944, and Prescott Radio Partners (*PRP*), the licensee of station KFPB(FM), Channel 280C3, Chino Valley, Arizona, Facility ID No. 109, (collectively, the *Petitioners*), by their respective communications counsel, jointly seek reconsideration of Report and Order, DA 03-3748 (rel. November 26, 2003), 68 Fed. Reg. 69327 (pub. December 12, 2003) in this proceeding (the *R&O*).

I. BACKGROUND

A. THE PETITION AND THE NPRM

1 The Petition for Rule Making of Liberty Ventures III, LLC (*Liberty*) prompted the Media Bureau to issue the Notice of Proposed Rule Making in the instant proceeding. 17 FCC Rcd 1660 (2002) (the *NPRM*) The *NPRM* proposed to allot Channel 285A to Ash Fork, Arizona as a first local service.¹

¹ Reference point: North Latitude 35° 12' 27", West Longitude 112° 37' 49"

B. COMMENTS AND COUNTERPROPOSALS

2. Liberty filed a timely expression of continuing interest in a first local service at Ash Fork. NPR and Spectrum Scan, LLC (*Spectrum Scan*) each advanced timely Counterproposals on the Comment deadline (March 18, 2003). Sierra H Broadcasting, Inc. (*Sierra H*) and Deborah Comley each filed Petitions for Rule Making that were treated as timely Counterproposals in this proceeding. In the case of Sierra H, the Petition was filed on the Comment deadline. Ms Comley had filed her Petition earlier. Tusayan Broadcasting Company, Inc. (TBCI) filed an untimely Counterproposal. NPR's and Spectrum Scan's timely Counterproposals each involved several different communities. Sierra H's and Deborah Comley's Petitions and TBCI's Counterproposal each involved a single community. Here are the details.

1. NPR

3. NPR's Counterproposal was as follows.

- NPR requested the allotment of Channel 285C3 to Peach Springs, Arizona.² This request directly conflicted with the NPRM
- To satisfy Liberty's desire to provide first local service to Ash Fork, NPR proposed the allotment of Channel 280A to that community.³
- Because the licensed facilities of station KZKE, Channel 277A, Seligman, Arizona, FCC Facility ID No. 56339,⁴ precluded NPR's proposed Channel 280A allotment to Ash Fork, NPR requested the shift of station KZKE to any of several alternative Class A channels at KZKE's licensed transmitter site.

²Reference Point: North Latitude 35° 31' 39"; West Longitude 113° 19' 49".

³NPR employed the same reference point for Channel 280A as the NPRM had used for Channel 285A: North Latitude 35° 12' 27"; West Longitude 112° 37' 49".

⁴Located at. North Latitude 35° 19' 26"; West Longitude 112° 45' 55".

- Because the licensed facilities of station KFPB, Channel 280C3, Chino Valley, Arizona,⁵ also precluded NPR's proposed Channel 280A allotment to Ash Fork, NPR proposed, with PRP's consent, the shift of station KFPB to Channel 232C3 at a new site (the *Chino Valley Channel Substitution*).⁶

and

- Because station KFPB's licensed facilities also precluded a cochannel upgrade of NPR's station KEDJ, Channel 280C2, Gilbert, Arizona, NPR also proposed upgrading KEDJ to Channel 280C1 (the *Gilbert Upgrade*).⁷

2. SPECTRUM SCAN

4 Spectrum Scan's Counterproposal was as follows.

- Spectrum Scan requested the allotment of Channel 285C1 to Fredonia, Arizona.⁸ This request directly conflicted with the NPRM.
- To satisfy Liberty's desire for local service to Ash Fork, Spectrum Scan proposed the allotment of Channel 223A instead, using the NPRM's reference point.
- Because a proposed Channel 223A allotment to Chino Valley, Arizona⁹ precluded Spectrum Scan's proposed Channel 223A allotment to Ash Fork, Spectrum Scan proposed allotting Channel 232A to Chino Valley instead of Channel 223A.¹⁰
- Because the licensed facilities of Spectrum Scan's station KRRN (ex-KRCY), Channel 224C, Dolan Springs, Arizona, FCC Facility ID No. 27982,¹¹ also

⁵Located at: North Latitude 34° 42' 52"; West Longitude 112° 31' 33".

⁶North Latitude 34° 42' 52"; West Longitude 112° 33' 04".

⁷Reference Point: North Latitude 33° 25' 39"; West Longitude 111° 28' 03".

⁸Reference Point: North Latitude 36° 57' 50"; West Longitude 112° 31' 32".

⁹Reference Point: North Latitude 34° 46' 10"; West Longitude 112° 31' 03". See MM Docket No. 01-264

¹⁰Reference point: North Latitude 34° 46' 10"; West Longitude 112° 31' 03".

¹¹Located at: North Latitude 35° 35' 31"; West Longitude 114° 16' 21".

precluded Spectrum Scan's proposed Channel 223A allotment to Ash Fork. Spectrum Scan additionally proposed the relicensing of KRRN to Moapa Valley, Nevada, on its present channel, but with a shift to a new transmitter site ¹²

- Because the licensed facilities of station KXFF, Channel 223C, Cedar City, Utah, FCC Facility ID No. 61386¹³, precluded relicensing KRRN to Moapa Valley, Spectrum Scan proposed that KXFF shift to Channel 221C, with no site change.
- Because the licensed facilities of station KSGC, Channel 221A, Tusayan, Arizona, FCC Facility ID No. 68417,¹⁴ precluded KXFF's shift to Channel 221C, Spectrum Scan proposed shifting KSGC to Channel 222A, with no site change.

and

- Because Deborah Comley's proposed allotment of Channel 221A to Beaver, Utah,¹⁵ also precluded shifting Cedar City station KXFF to Channel 221C, Spectrum Scan proposed the allotment of either Channel 246A or Channel 261A to Beaver, at Ms. Comley's reference point.

3. SIERRA H

5 Sierra H proposed the relicensing of its station KAJM, Channel 282C, FCC Facility ID No. 52818, from Payson, Arizona, to Lake Montezuma, Arizona at a site¹⁶ other than the station's licensed transmitter site. Sierra H's reference point was only 101.2 km from NPR's reference point for Channel 280C1 at Gilbert. However, § 73.207(a) requires a 105-km minimum separation between second-adjacent-channel Class C1 and Class C stations. Sierra H's proposal was thus four kilometers short-spaced to NPR's proposed upgrade at Gilbert. This short

¹²Reference Point: North Latitude 36° 35' 06"; West Longitude 114° 36' 01"

¹³Located at North Latitude 37° 38' 41"; West Longitude 113° 22' 28".

¹⁴Located at North Latitude 35° 58' 14"; West Longitude 112° 07' 53".

¹⁵Reference Point: North Latitude 38° 16' 37"; West Longitude 112° 38' 25".

¹⁶Reference Point: North Latitude 34° 20' 03"; West Longitude 111° 35' 31".

spacing made Sierra H's proposal mutually exclusive with an integral element of NPR's Counterproposal — the Gilbert Upgrade. However, Sierra H's proposed relicensing of station KAJM to Lake Montezuma was *not* mutually exclusive with *any other element of any other proposal* either directly filed in or consolidated into this proceeding.

4. DEBORAH COMLEY

6. As noted above, Deborah Comley's proposed allotment of Channel 221A to Beaver, Utah conflicted with one element of Spectrum Scan's Counterproposal — the proposed shift of station KXFF from Channel 223C to Channel 221C at Cedar City, Utah — but not with any other aspect of any other proposal filed in or treated in this proceeding.

5. TUSAYAN BROADCASTING

7. As also noted above, in response to Spectrum Scan's Counterproposal, TBCI untimely proposed the allotment of Channel 222C2 to Tusayan, Arizona. This proposal was, in terms of station class, one step beyond one element of Spectrum Scan's Counterproposal — the shift of TBCI's Tusayan station KSGC from Channel 221A to Channel 222A.

6. NPR'S AND SPECTRUM SCAN'S GLOBAL RESOLUTION

8. Once NPR and Spectrum Scan had learned of each other's respective Counterproposals, they endeavored to resolve the mutual exclusivities between their respective Counterproposals and the NPRM's proposal allotment of Channel 285A to Ash Fork. In Reply Comments, before they were aware of Sierra H's Petition, NPR and Spectrum Scan advanced what they understood to be a Global Resolution of the proceeding. The proposed Global

Resolution entailed two components, the *NPR Component*, and the *Spectrum Scan Component*.

9. The NPR Component entailed:

- the allotment of Channel 280A to Ash Fork, Arizona;
- the allotment of Channel 285C3 to Peach Springs, Arizona;
- to accommodate Channel 280A at Ash Fork, the substitution of any of several channels to Seligman;
- to further accommodate both the allotment of Channel 280A to Ash Fork and the Gilbert Upgrade, the Chino Valley station Channel Substitution; and
- the Gilbert Upgrade.

10. The Spectrum Scan Component entailed:

- the allotment of either Channel 282C1 or Channel 283C1 to Fredonia, Arizona;
- the shift of station KRRN on Channel 224C from Dolan Springs, Arizona to Moapa Valley, Arizona;
- the substitution of Channel 221C for Channel 223C at Cedar City, Utah;
- the allotment of either Channel 246A or Channel 261 at Beaver, Utah; and
- the substitution of Channel 222A for Channel 221A at Tusayan, Arizona

11. Subsequently, upon learning of Sierra H's Lake Montezuma Petition, NPR suggested the use of a different reference point for the proposed Lake Montezuma allotment, to clear the proposed Gilbert Upgrade. Sierra H's subsequent decision to dismiss its Petition mooted this suggestion. NPR also subsequently suggested the allotment of Channel 267A to Ash Fork to permit Global Resolution of another proceeding (Cameron, Arizona, MB Docket 02-73).

C. STAFF ACTIONS

12 On August 26, 2002, via Report No. 2571, the staff correctly accepted for rule making as Counterproposals in this proceeding the following filings: NPR's and Spectrum Scan's Counterproposals; and Sierra H's and Deborah Comley's Petitions for Rule Making.

13. On July 24, 2003, the staff correctly released an Order in this proceeding, DA 03-2349. That Order dismissed, per Sierra H's request, the Lake Montezuma Petition for Rule Making. The Order correctly observed that Sierra H's, "... request [wa]s mutually exclusive with a timely filed counterproposal filed in this proceeding filed by NPR Phoenix, LLC ("NPR") to substitute Channel 280C1 for Channel 280C2 at Gilbert, Arizona."

14. On November 26, 2003, the staff released the R&O. The R&O granted the Moapa Valley relicensing of KRRN that Spectrum Scan had sought. To permit that, and to provide Beaver, Utah, with a first local service, the R&O allotted Channel 246A to Beaver and made the requested channel substitutions at Cedar City and Tusayan. The R&O also allotted:

- Channel 267A to Ash Fork (as NPR had suggested); and
- Channel 278C1 to Fredonia (as NPR and Spectrum Scan had suggested); and
- Channel 285C3 at Peach Springs (as NPR and Spectrum Scan had jointly suggested).

However, the R&O *did not* grant the Gilbert Upgrade and the Chino Valley Channel Substitution. The R&O stated that the Chino Valley Channel Substitution (and that at Seligman) were unnecessary in light of the other actions taken. The R&O also stated that the Gilbert Upgrade, "... does not conflict with any proposal in this proceeding and [therefore] cannot be considered in the context of this proceeding." Id. at n. 4.

II. ARGUMENT

15 The Petitioners (*i.e.*, NPR and PRP) jointly seek reconsideration only with respect to the R&O's failure to grant the Chino Valley Channel Substitution and Gilbert Upgrade. As the Petitioners will now show, the R&O's failure to grant the Chino Valley Channel Substitution and Gilbert Upgrade within this proceeding appears to stem from a misunderstanding of the facts. It is also inconsistent with binding precedent. Moreover, the R&O's failure to grant the Chino Valley Channel Substitution and Gilbert Upgrade also runs counter both to the public interest as well as to § 307(b)'s overriding concern for the efficient use of the spectrum. See 47 U.S.C. § 307(b). The staff should therefore promptly issue a Memorandum Opinion and Order granting the Chino Valley Channel Substitution and Gilbert Upgrade, and concomitantly modifying KEDJ's and KFPB's licenses.

A. THE CHINO VALLEY CHANNEL SUBSTITUTION AND GILBERT UPGRADE WERE ENTITLED TO FAVORABLE TREATMENT IN THIS PROCEEDING AS A MATTER OF LAW, BY OPERATION OF THE CUT-OFF RULES.

16. The Chino Valley Channel Substitution and Gilbert Upgrade were an *integral part* of NPR's Counterproposal in this proceeding. They *cannot* be amputated from this proceeding, for that would violate NPR's and PRP's cut-off rights.

17. To be entitled to consideration in any given allotment rule-making, a proposed allotment or series of interrelated allotments must satisfy two criteria:

- First, the proposed allotment or series of interrelated allotments must be filed by a date certain — the deadline for Comments and Counterproposals in the particular docket.
- Second, the proposed allotment or series of interrelated allotments must conflict with either the Notice of Proposed Rule Making, or with a timely filed Counterproposal, or with some other proposal which is on file by the Comment deadline and which is drawn

into the proceeding via a spacing conflict with either a timely proposal or an alternative allotment to a community specified in the Notice or in in a timely filed proposal.

This is fundamental to the law of cut-off rules. The FCC adopted such rules in response to the Supreme Court's watershed decision in Ashbacker Radio Corp. v. FCC, 326 U.S. 327 (1945), which required the FCC to accord comparative consideration to mutually exclusive proposals. The Courts have consistently approved the cut-off rules as a valid means by which the FCC could fill a void identified by the Ashbacker Court, and by which the FCC could provide comparative consideration without wading into an administrative morass. See, e.g., Committee for Open Media v. FCC, 543 F.2d 861, 873 (D.C. Cir. 1976), Radio Athens, Inc. (WATH) v. FCC, 401 F.2d 398; Century Broadcasting Corp. v. FCC, 310 F.2d 864, 866 (D.C. Cir. 1962); Ranger v. FCC, 294 F.2d 240, 243 (D.C. Cir. 1961).

18. The cut-off rules serve two purposes. First, the cut-off rules advance the critically important goal of administrative finality. "There must be some point in which the Commission can close the door to new parties to a comparative hearing or, at least hypothetically, no licenses could ever be granted." Radio Athens, supra, 401 F.2d at 401. Second, but no less important, the cut-off rules grant a "protected status" to timely filers. See Ranger, supra, 294 F.2d at 243; see also Florida Institute of Technology v. FCC, 952 F.2d 549 (D.C. Cir. 1992). That protection enables timely filers to prepare for what often will be an expensive and time-consuming contest, fully aware of exactly which competitors they will be facing. See, e.g., Bronco Broadcasting Co., 50 FCC 2d 529, 533-534 (1974); Howard University, 23 FCC 2d 714, 716 (1970).

19. The cut-off rules apply not only to proposals that directly conflict with an initial technical proposal, but also to proposals that would conflict with (or that would be precluded by) another proposal that would itself be cut off, directly or indirectly, if that other proposal is filed by the applicable cut-off date. In other words, the cut-off rules apply to all links in a "daisy chain." In Kittyhawk Broadcasting Corp., 7 FCC 2d 153 (1967), the FCC placed a lead applicant, **A**, on an "A" cut-off list. In response to that list, applicant **B** timely filed a technical proposal that was directly in conflict with **A**'s proposal. After the cut-off date, a third applicant, **C**, filed a technical proposal that conflicted with **B**'s technical proposal, but not with **A**'s technical proposal. The FCC dismissed **C**'s filing as untimely against **A**'s cut-off date. The fact that **C**'s technical proposal did not conflict with **A**'s was of no consequence. **C** was held responsible to have anticipated **B**'s filing, even if **C** had no knowledge — or even an inkling — of **B**'s plans to file. **C**, as the last link in the daisy chain, had to file by **A**'s cut-off date. The Court upheld the FCC's determination. See Cook, Inc. v. United States, 394 F.2d 84 (7th Cir. 1968).

20. The FCC has strictly adhered to this principle in FM allotment proceedings. For example, in Pinewood, South Carolina, 5 FCC Rcd 7609 (1990), the staff dismissed a technical proposal that conflicted with an allotment that had been made to a particular community, even though the channel allotted was not the one originally proposed in the pertinent Notice of Proposed Rule Making. The FCC enforced the language of 47 C.F.R. § 1.420(d), and of language in the Appendix to the Notice — language that the NPRM's Appendix itself contained:

3. Cut-off Procedures The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered, if advanced in initial comments, so that parties may comment on them in reply

comments. They will not be considered if advanced in reply comments. (See Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal in this Notice, they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

See also, Barnwell, South Carolina et al., 16 FCC Rcd 17860 (M.M. Bur. 2001), recons. den., 17 FCC Rcd 18956 (M. Bur. 2002), further recons. den., 18 FCC Rcd 15152 (M. Bur. 2003); Beverly Hills et al., Florida, 65 Fed. Reg. 53639 (2000), Benjamin, Texas, 17 FCC Rcd 10994 (2002). Compare, Littlefield et al., Texas, 15 FCC Rcd 5532 (2000).

21. The staff aptly put it this way in Taccoa et al., Georgia, 16 FCC Rcd 21191 (2001): A Notice of Proposed Rule Making elicits counterproposals and alerts parties that future FM rulemaking and application proposals could be foreclosed by the filing of a counterproposal. After the comment date in a rulemaking proceeding, parties cannot file a competing proposal to the underlying proposal or [to any] counterproposal. Such parties can be permanently prejudiced by the filing of a counterproposal because the counterproposal is deemed to be the "logical outgrowth" of the proposal and within the scope of that Notice. See Weyerhaeuser Company v. Costle, 590 F.2d 702 (D.C. Cir. 1978); Owensboro on the Air v. United States, 262 F.2d 1011, 1031 (D.C. Cir. 1958); see also Pinewood, South Carolina, 5 FCC Rcd 7609 (1990).

The above-quoted language applies with particular force here.

22. Exhibit A to this Petition is a chart that depicts the chains of conflicts that existed among the timely filed proposals as of the close of Commission business on March 18, 2002 — the deadline for Comments and Counterproposals in this proceeding. Exhibit A is, in essence, a snapshot of the mutual exclusivities that existed in MM Docket 02-12 as of the critical instant in time for determining which proposals had earned the right to consideration in this proceeding.

23. As Exhibit A demonstrates, NPR's proposed allotment of Channel 285C3 to Peach Springs conflicted directly both with the NPRM and with the Fredonia component of Spectrum Scan's Counterproposal. In addition, NPR's proposed Chino Valley Channel Substitution directly conflicted with Spectrum Scan's proposed allotment of Channel 232A to Chino Valley. Because NPR's proposed Gilbert Upgrade directly required the Chino Valley Channel Substitution, and because that substitution directly conflicted with the Chino Valley element of Spectrum Scan's own Counterproposal, the Gilbert Upgrade and Chino Valley Channel Substitution were properly and timely lodged in this proceeding. The Chino Valley Channel Substitution and Gilbert Upgrade thereby earned "protected status" in this proceeding, and became entitled to a grant in *this* proceeding if the parties could engineer a Global Resolution (which they were able to do)

24. Had NPR waited *just one more day* to file its Counterproposal *late*, the already cut-off Spectrum Scan's Counterproposal would have time-barred the Peach Springs *and* the Chino Valley Channel Substitution/Gilbert Upgrade *and* the Ash Fork elements of NPR's Counterproposal.¹⁷ In the words of Taccoa, supra, NPR would have been "permanently prejudiced by the filing of [Spectrum Scan's] counterproposal" if NPR had not filed what it did, when it did. It was incumbent upon NPR both to anticipate Spectrum Scan's Counterproposal, and to timely counterpropose the Chino Valley Channel Substitution and Gilbert Upgrade in a Counterproposal *in this docket*. Having done what Kittyhawk mandates, the staff cannot penalize NPR for doing so and fail to accord cut-off status to all aspects of its Counterproposal.

¹⁷The Chino Valley substitution was also necessary to the allotment of Channel 280A to Ash Fork, another element of NPR's Counterproposal, which was designed to satisfy Liberty's desire to provide a first local service to Ash Fork.

25 Perhaps the best proof of the need to favorably treat the Chino Valley Channel Substitution and Gilbert Upgrade *in this proceeding* is to assume, for the sake of argument, that NPR *did not* file any Counterproposal in this proceeding. Rather, suppose that, on March 19, 2002 -- the day *after* the deadline for Counterproposals in this proceeding, NPR had instead filed a *de novo* Petition for Rule Making requesting only the Chino Valley Channel Substitution and the Gilbert Upgrade. Exhibit B hereto depicts that hypothetical Petition for Rule Making in chart form. Exhibit B also depicts: the original Ash Fork Petition/NPRM; Spectrum Scan's Counterproposal, and Sierra H's *de novo* Petition for Rule Making, filed on MM Docket 02-12's Counterproposal deadline.

26. Pursuant to Kittyhawk, Pinewood, Benjamin, Taccoa, myriad other cases, and pursuant to Paragraph 3(a), 3(b), and 3(c) of the NPRM Appendix itself, the filing of Spectrum Scan's Counterproposal the day before would have time-barred consideration of NPR's hypothetical *de novo* Petition, due to the conflicting proposed use of Channel 232 at Chino Valley by Spectrum Scan. The FCC simply could not have both: (a) allotted vacant Channel 232A to Chino Valley for future filings in an auction window; and (b) at the same time (or subsequently) made the Chino Valley Channel Substitution.

27. As Exhibit C hereto (the Engineering Statement of Elliott Kurt Klein, NPR's technical consultant) indicates, *other than the current Channel 280C3*, Channel 232C3 is the *only* Class C3 channel that the FCC can allot to Chino Valley consistent with the pertinent technical requirements. Therefore, had NPR waited just one day to file its hypothetical *de novo* Petition, NPR would have been permanently foreclosed from advancing the upgrade of station KEDJ. The FCC would have rightfully dismissed NPR's Counterproposal as a Johnny-come-lately to

Spectrum Scan's timely Counterproposal¹⁸ Sierra H's Lake Montezuma Petition, however, would *not* have been pulled into the Ash Fork proceeding as a Counterproposal, because it conflicted *only* with the Gilbert Upgrade. In that event, the Commission would have opened a separate docket in which to process the Lake Montezuma Petition.

28. To further prove the point, suppose, for the sake of argument, that NPR had filed its hypothetical *de novo* Petition for Rule Making (again, advancing only the Chino Valley Channel Substitution and Gilbert Upgrade) on March 18, 2002 — the deadline for Counterproposals in this docket. In this case, NPR's hypothetical Petition would have been pulled into this docket due to the spacing conflict between it and the Chino Valley element of Spectrum Scan's Counterproposal. In this scenario, Sierra H's Petition would also have been pulled into this docket (as it in fact was) — due *solely* to the conflict between the Gilbert Upgrade and Sierra H's proposed relicensing of KAJM to Lake Montezuma.

29. If, as NPR has just proven, the Chino Valley Channel Substitution and Gilbert Upgrade would have been pulled into this docket, had NPR proposed only those two items on the Comment deadline, then surely, the Chino Valley Channel Substitution and Gilbert Upgrade, proposed along with allotments of Channel 280A to Ash Fork and of Channel 285C3 to Peach Springs, had equally to be considered as a valid Counterproposal in this proceeding (if not more so). The fact that NPR included additional elements in its Counterproposal provides *no basis* for amputating both the Gilbert Upgrade and the Chino Valley substitution from this proceeding. Taccoa, supra; Pinewood, supra. The R&O, having performed that amputation, thus violated the

¹⁸"It is well established that mutual exclusivity arises when grant of one application would preclude grant of a second." Nelson Enterprises, Inc. et al., 18 FCC Rcd 3414 (2003) at Para. 10. citing. Kittyhawk, supra.

“protected status” of the Chino Valley Channel Substitution and Gilbert Upgrade, to which they were — and are — entitled as a matter of law.

B. THE R&O’S TREATMENT OF THE GILBERT UPGRADE IS COMPLETELY INCONSISTENT WITH THE JULY 2003 ORDER IN THIS PROCEEDING.

30. Without *any* explanation, the two orders issued in this proceeding — the R&O and the July 24, 2003 Order (DA 03-2349) — reached irreconcilable conclusions on the nature of the Gilbert Upgrade. In late July, the Gilbert Upgrade was a Counterproposal in this proceeding. In late November, it allegedly was not. Nothing had changed but the result.

31. The July Order granted Sierra H’s Motion to Withdraw its Lake Montezuma Petition for Rule Making. The staff said:

The Audio Division has before it a Petition for Rule Making filed by Sierra H Broadcasting, Inc. (“Sierra H”) that was included in a Public Notice, Report No. 2571, released August 26, 2002, as a timely counterproposal (RM-10552*) in this proceeding. *Sierra H’s Petition for Rule Making was included as a counterproposal because it requested that Station KAJM(FM) be allowed to change its community of license for Channel 282C from Payson to Lake Montezuma, Arizona, and that request is mutually exclusive with a timely filed counterproposal in this proceeding filed by NPR Phoenix, LLC (“NPR”) to substitute Channel 280C1 for Channel 280C2 at Gilbert, Arizona.*

[Emphasis added.] The staff was *clearly correct* in July, and *clearly incorrect* in November

C. THE R&O’S TREATMENT OF THE CHINO VALLEY CHANNEL SUBSTITUTION AND GILBERT UPGRADE CONTRAVENES THE MANDATE OF MELODY MUSIC.

32. The fact that NPR and Spectrum Scan were able to resolve all of the mutual exclusivities in this proceeding *cannot* justify the R&O’s amputation of the Chino Valley Channel Substitution and Gilbert Upgrade from the rest of this docket. The FCC has *never* stripped parties of their protected cut-off status simply because they have achieved engineering

solutions to the conflicts between their and other parties' respective proposals. To the contrary, the FCC has *encouraged* parties to achieve engineering solutions where possible, and has allowed them to retain their cut-off protection.

33. This traditional policy of encouragement is eminently well grounded. It conserves scarce Commission processing resources. It also furthers the § 307(b) goal of the most efficient use of the spectrum possible.¹⁹ See, e.g., Public Notice, AM Auction No. 32 Mutually Exclusive Applicants Subject to Auction; Settlement Period for Groups Which Include a Major Modification Applicant; Filing Period for Section 307(b) Submissions, 15 FCC Rcd 20449 (2000). See also, Cross Plains, Texas et al., 14 FCC Rcd 19410 (1999).

The Commission has before it the "Joint Counterproposal and Global Resolution of MM Docket Nos. 97-26 and 97-91" filed by Heftel Broadcasting Corporation, Metro Broadcasters-Texas, Inc., Jerry Snyder and Associates, Inc. and Hunt Broadcasting, Inc. (collectively referred to as "Heftel-Hunt") in response to the Notice of Proposed Rule Making in this proceeding. 13 FCC Rcd 20965 (1998). In the Joint Counterproposal, Heftel-Hunt sets forth multiple channel substitutions including the substitution of Channel 246C1 for Channel 238C1 at Haskell, Texas, which conflicts with the Channel 245C3 allotment at Cross Plains proposed in the Notice.

* * * *

In this instance, the substitution of Channel 246C1 at Haskell will both accommodate the channel substitutions proposed in this proceeding and an overall resolution of pending MM Dockets No. 97-26 and MM Docket No. 97-91. Along with the resolution of this proceeding, finalizing MM Docket Nos. 97-26 and 97-91 will provide significant public interest benefits.

¹⁹Spectral efficiency is of "paramount" concern under § 307(b) of the Act. Endicott, New York, 51 FCC 2d 50, 51 (1975). Accordingly, there is a long history of favoring multiple allotments over single ones. See, e.g., Stuart and Boone, Iowa, 5 FCC Rcd 4537 (M.M. Bur. 1990), recons. den., 6 FCC Rcd 6036 (1991) Miami, West Virginia, 58 Rad. Reg. (P & F) 2d 146, 148 (M.M. Bur. 1985); Micanopy and Williston, Florida, 50 Rad. Reg. (P & F) 2d 1425 (B. Bur. 1982), Marshfield, Massachusetts, 33 Rad. Reg. (P & F) 2d 611, 613 (B. Bur. 1975).

But here, the R&O did the *exact opposite*:

In this instance, this proposed upgrade at Gilbert does not conflict with any proposal in this proceeding and cannot be considered in the context of this proceeding.

* * * *

In the Joint Reply Comments, the parties suggested the allotment of Channel 280A to Ash Fork. We are allotting alternate Channel 267A to accommodate a resolution of MM Docket No. 02-73. As a result of this allotment, it will not be necessary to make two related channel substitutions. Specifically, we will not substitute Channel 227A for Channel 277A at Seligman, Arizona, and modify the Station KZKE license to specify operation on Channel 227A, or substitute Channel 232C3 for Channel 280C3 at Chino Valley, Arizona, and modify the Station KFPB license to specify operation on Channel 232C3.

R&O at n. 4, n. 6.

34. There is no question that the Chino Valley Channel Substitution, and thus the Gilbert Upgrade, conflicted with Spectrum Scan's proposal to allot Channel 223A to Ash Fork. The mutual exclusivity dissolved only through the efforts of NPR and Spectrum Scan which resulted in an engineering solution that gave allotments of the desired Classes to all candidate communities in this proceeding. And it was *NPR*, in a filing in MM Docket 02-73 (Cameron, Arizona), that suggested, just as the R&O ultimately conferred, the allotment of Channel 267A to Ash Fork. NPR's suggestion was motivated solely to allow for global resolutions in both the Ash Fork and Cameron proceedings. Because the FCC has consistently *rewarded* parties for achieving engineering settlements, and not *penalized* them by stripping them of their "protected status" under the cut-off rules, the staff cannot treat NPR any differently here. Melody Music, Inc. v. FCC, 345 F.2d 730 (DC Cir. 1965).

35. Moreover, it is impossible to reconcile the R&O's grant of Spectrum Scan's request to relicense station KRRN to Moapa Valley with the R&O's failure to grant the Chino Valley Channel Substitution and Gilbert Upgrade. It is obvious that the relicensing of station KRRN to Moapa Valley only became indirectly mutually exclusive with the NPRM as a result of Spectrum Scan's careful structuring of its Counterproposal. Spectrum Scan could well have proposed the allotment of a channel to Ash Fork that did not require the relicensing of station KRRN to Moapa Valley, *e g* , Channel 267A or Channel 280A. Spectrum Scan could also have filed a *de novo* Petition for Rule Making seeking the relicensing of KRRN to Moapa Valley. That Petition would not have been mutually exclusive, directly or indirectly, to an allotment to Ash Fork, and would not have been considered in this docket.

36. The mutual exclusivity between the KRRN relicensing and an allotment to Ash Fork resolved itself when NPR and Spectrum Scan filed their Global Resolution, just as the mutual exclusivity between the Chino Valley Channel Substitution and Gilbert Upgrade, on the one hand, and an allotment to Ash Fork resolved itself. If the R&O was going to amputate the Chino Valley Channel Substitution and Gilbert Upgrade from this proceeding, by the same logic, the R&O should have amputated the Moapa Valley relicensing.

37. Let's be clear: the FCC *must not* undo the Moapa Valley relicensing. That would violate almost four decades of cutoff law and more than two decades of allotment procedure. But the FCC must implement the Chino Valley Channel Substitution and Gilbert Upgrade in this proceeding, to comport with the very same precedent and with Melody Music.

38. Spectrum Scan was wholly within its rights to fashion its Counterproposal just exactly as Spectrum Scan did. By the same token, NPR was just as wholly within its own rights

to fashion its own Counterproposal, with PRP's cooperation, just exactly as NPR did. Based on elementary concepts of equal protection and procedural due process, NPR and PRP, on the one hand, were just as entitled to the implementation of the Chino Valley Channel Substitution and the Gilbert Upgrade as that which the R&O accorded to Spectrum Scan and the Moapa Valley relicensing. The blatantly disparate treatment that did occur in the R&O violated the D.C. Circuit's unambiguous mandate that the FCC must treat similarly situated parties similarly.

39. The **R&O's** treatment of NPR's Counterproposal is also completely at odds with other actions that the staff has routinely taken. See, e.g., Crisfield, Maryland et al., 18 FCC Red 19199 (rel Sept. 29, 2003), 68 Fed. Reg. 59748 (pub. October 17, 2003). In Crisfield, the licensee of station WBEY requested the substitution of Channel 250A for Channel 245A to resolve cochannel tropospheric-ducting interference that WBEY received from Atlantic City station WFBG-FM. However, a joint Counterproposal suggested instead:

- allotment of Channel 250B1 to Belle Haven, Virginia, as a first local service; and
- to accommodate Channel 250B1 at Belle Haven, the substitution of Channel 290A for vacant Channel 252A at Nassawadox, Virginia, and
- to accommodate Channel 290A at Nassawadox, the relicensing to Poquoson, Virginia of Channel 291A, Exmore, Virginia station WEXM; and
- to ensure continued local service to Exmore, the relicensing of Channel 241B, Cape Charles station WROX-FM to Exmore

Notwithstanding the fact that neither the Poquoson nor the Exmore relicensing directly conflicted with the Crisfield proposal, the Commission granted the Counterproposal *in its entirety*. The same result must obtain here.

D. THE REJECTED TUSUYAN COUNTERPROPOSAL

40 Finally, NPR notes that, even though the staff properly rejected TBCI's Class C2 Tusayan Counterproposal, it appears that TBCI can achieve its desired Class C2 upgrade of station KSGC simply by filing a one-step-upgrade application on the effective date of the R&O. See Exhibit C.

III. CONCLUSION

41. The Chino Valley Channel Substitution and Gilbert Upgrade, an integral part of both NPR's Counterproposal and the joint NPR and Spectrum Scan Global Resolution, were and are entitled to "protected status" and to favorable action in this proceeding. The R&O's failure to accord such status and to grant the Chino Valley Channel Substitution and Gilbert Upgrade unjustifiably deprived NPR and PRP of equal protection and procedural due process. The R&O's failure to grant the Chino Valley Channel Substitution and Gilbert Upgrade in this proceeding also contravened the mandate of § 307(b) of the Communications Act.

42 For all of the above reasons, the staff should immediately issue a Memorandum Opinion and Order implementing the Chino Valley Channel Substitution and Gilbert Upgrade in this proceeding

Respectfully submitted,

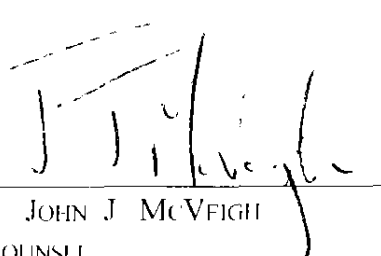
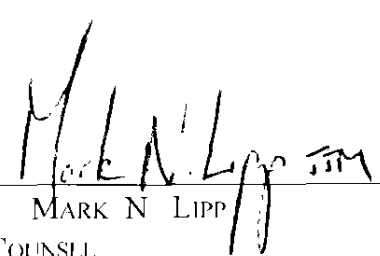
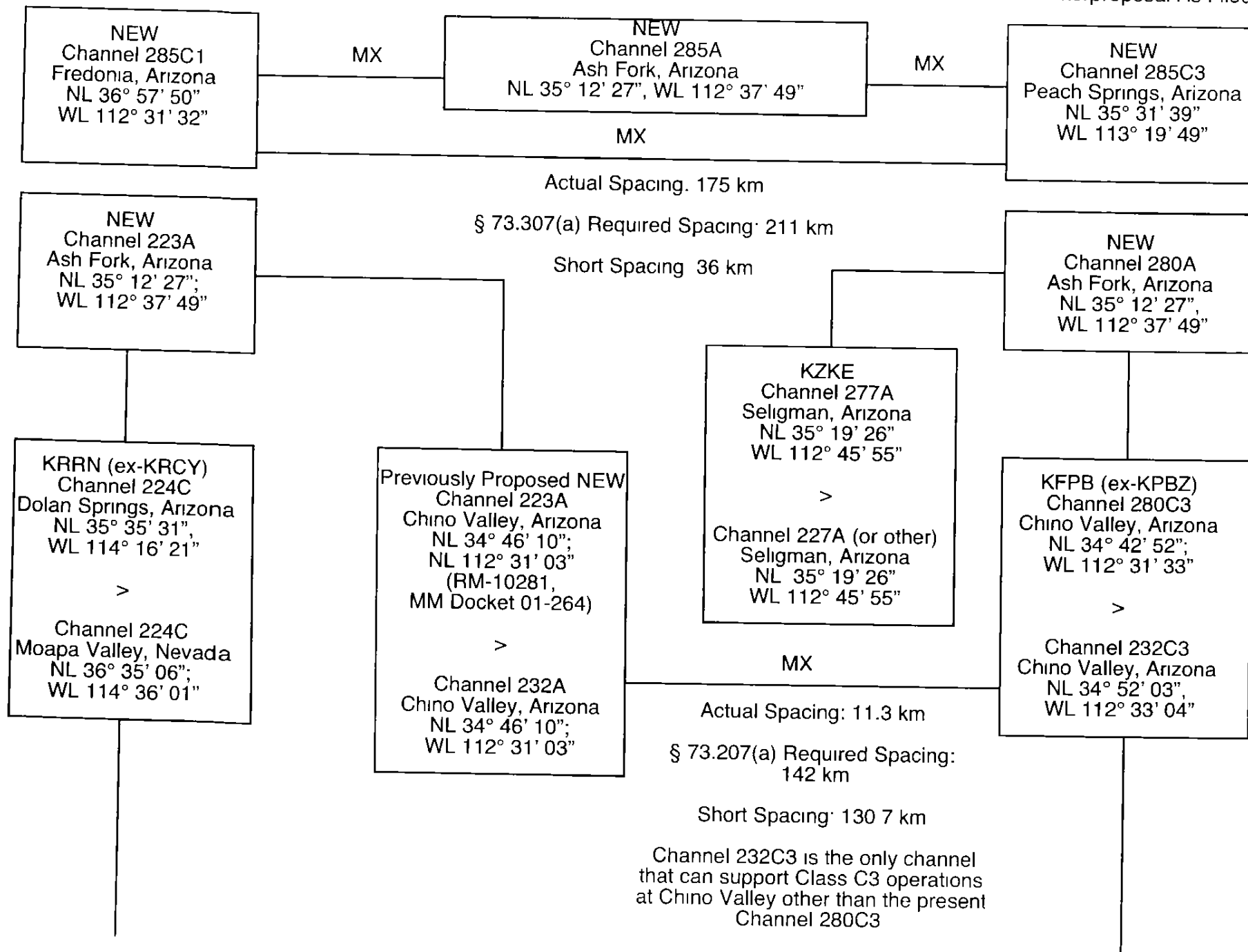
NPR PHOENIX, LLC	PRESCOTT RADIO PARTNERS
BY 	BY 
JOHN J. McVEIGH ITS COUNSEL	MARK N. LIPP ITS COUNSEL
JOHN J. McVEIGH, ATTORNEY AT LAW 12101 BLUE PAPER TRAIL COLUMBIA, MARYLAND 21044-2787 301.596.1655	VINSON & ELKINS, LLP 1455 PENNSYLVANIA AVENUE NORTHWEST, SUITE 600 WASHINGTON, D.C. 20004-1008 202.639.6771
DATE: DECEMBER 19, 2003	

EXHIBIT A

Spectrum Scan
Counterproposal As Filed

Liberty Ventures III, LLC
Petition for Rule Making/NPRM

NPR Phoenix
Counterproposal As Filed



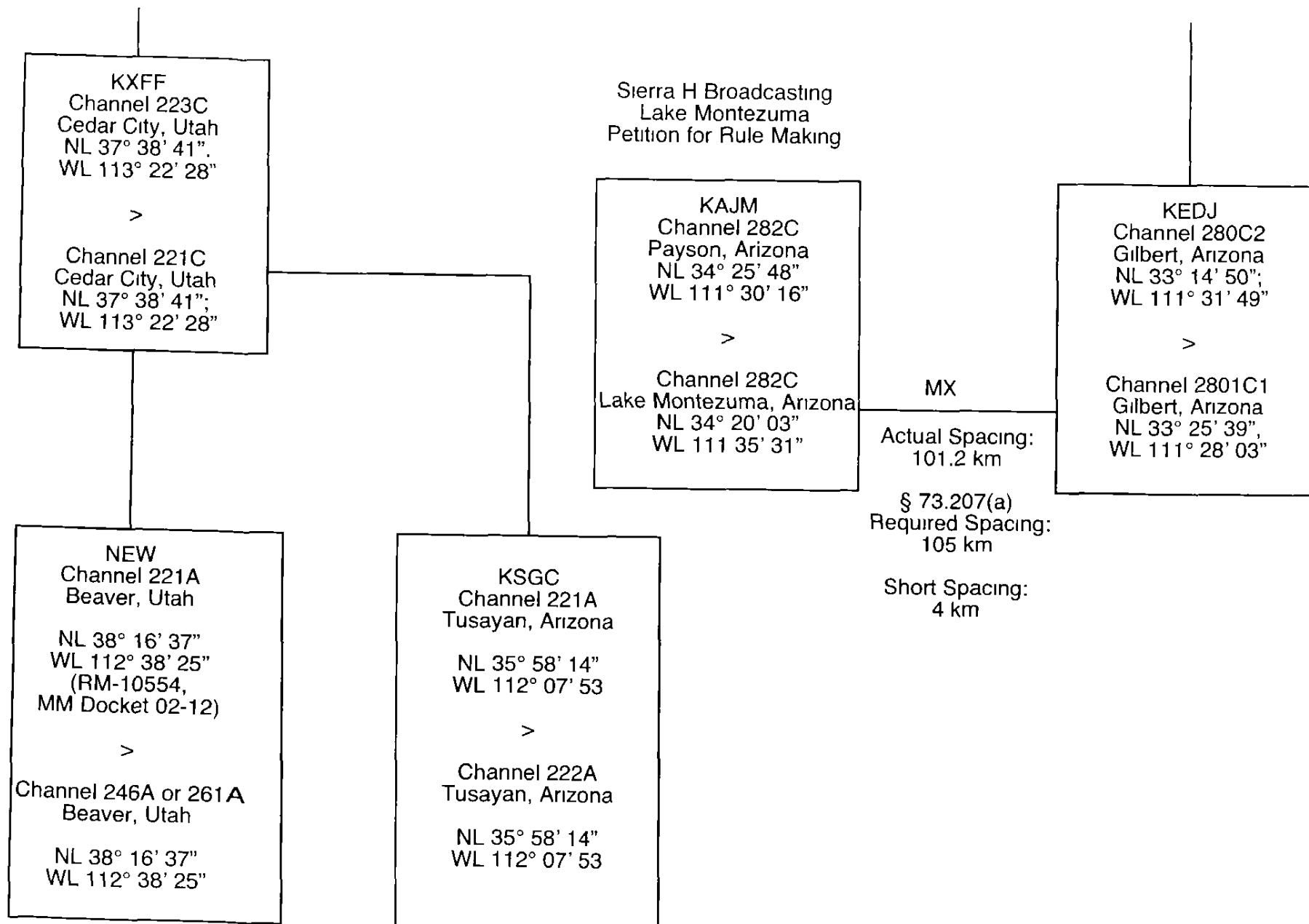
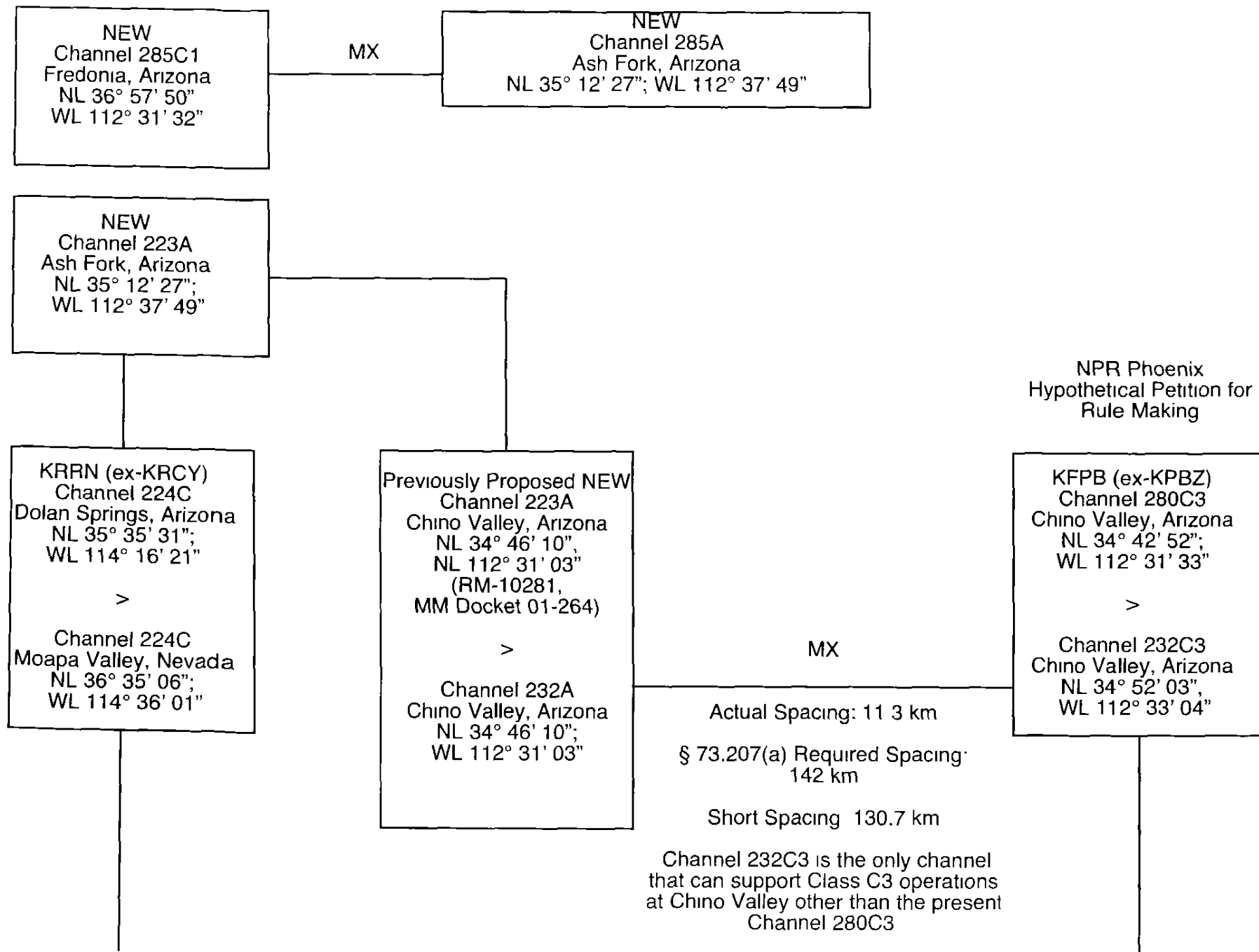


EXHIBIT B

Spectrum Scan
Counterproposal as Filed

Liberty Ventures III, LLC
Petition for Rule Making/NPRM



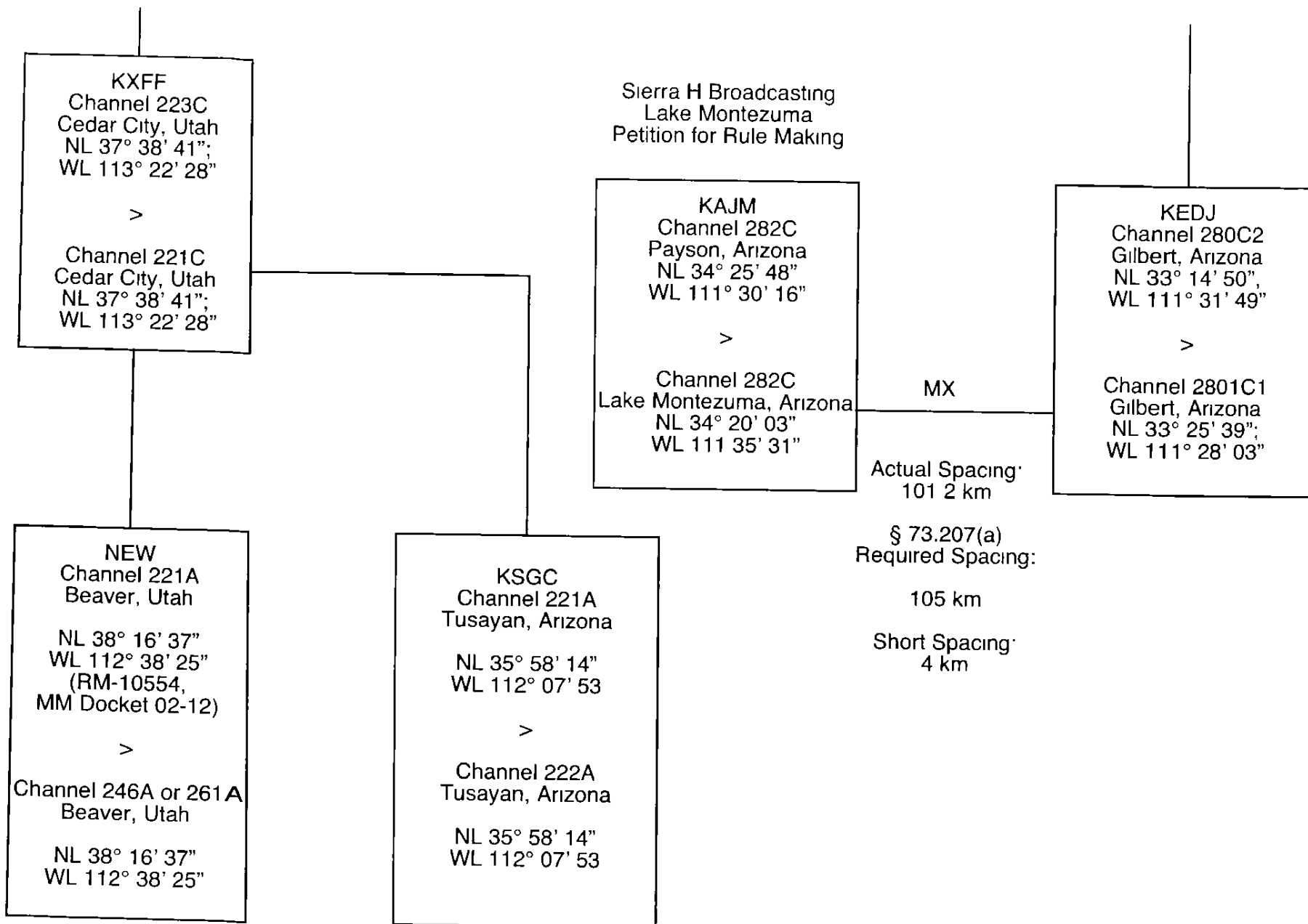


EXHIBIT C

KLEIN BROADCAST ENGINEERING, L.L.C.

dedicated to improving the science and technology of radio & television communications

ENGINEERING STATEMENT

Of

Elliott Kurt Klein

In Support of A Joint Petition for Reconsideration

Before The

FEDERAL COMMUNICATIONS COMMISSION

MM Docket No. 02-12

NPR Phoenix, L.L.C. & Prescott Radio Partners

All distance calculations used in this Engineering Statement are based on the use of North American Datum 1927 geographic coordinates and the FCC Method of distance calculation.

As one element of a timely filed Counterproposal in MM Docket No. 02-12, Spectrum Scan, L.L.C. proposed the allotment of FM Channel 232 Class A to Chino Valley, Arizona, at the following reference coordinates:

NL: 34-46-10 / WL: 112-31-03

As one element of another timely filed Counterproposal in the same Docket, NPR Phoenix, L.L.C. ("NPR") proposed the allotment of FM Channel 232 Class C3 to Chino Valley, Arizona, at the following reference coordinates:

NL: 34-42-52 / WL: 112-33-04

This Class C3 channel would be a substitute for the existing Channel 280C3, occupied by the licensed facilities of station KFPB(FM), FCC Facility ID No. 109, at another site.

ENGINEERING STATEMENT cont'd page two: Petition For Reconsideration

These two elements of the respective Counterproposals as filed were spaced only 6.83 kilometers apart. They were therefore substantially short spaced to each other under 47 C.F.R. Section 73.207(a). Under that rule, the required separation of cochannel class A and class C3 allotments is 142 kilometers. Thus, the short spacing under § 73.207(a) was 135.17 kilometers, making the above two Counterproposals involving FM Channel 232A and FM Channel 232C3 at Chino Valley, Arizona, *mutually exclusive*.

In its timely filed Counterproposal, NPR requested substitution of FM Channel 232C3 for existing Channel 280C3 at Chino Valley because FM Channel 280C3, used by Chino Valley FM Broadcast Station KFPB, short spaced another element of NPR's Counterproposal -- the upgrade of FM Channel 280 at Gilbert, Arizona, from Class C2 to Class C1. NPR had *no choice* but to propose the use of FM Channel 232C3 at Chino Valley. This is because NPR had found that FM Channel 232C3 was the *only* Class C3 FM Channel that could be substituted for existing FM Channel 280C3 at Chino Valley that could thereby eliminate the short spacing between the existing Chino Valley Class C3 allotment and NPR's proposed upgrade to Class C1 status of the existing Class C2 FM allotment on FM Channel 280 at Gilbert, Arizona. The § 73.207(a) required distance separation between cochannel Class C3 and Class C1 allotments is 211 kilometers. The actual distance between KFPB(FM) on FM Channel 280 C3 at Chino Valley, Arizona and the proposed FM Channel 280 C1 at Gilbert, Arizona is 172.98. Therefore, the existing Chino Valley allotment and the proposed Class C1 Gilbert upgrade would be short spaced to each

ENGINEERING STATEMENT cont'd page three: Petition For Reconsideration

other and mutually exclusive with each other by 38.02 kilometers.

The geographic coordinates used in this calculation are as follows. For FM Channel 280C3 at Chino Valley, Arizona, we have employed the licensed coordinates for FM Broadcast Station KFPB:

NL: 34-42-52 / WL: 112-31-33.

For NPR's proposed upgrade of FM Channel 280 at Gilbert, Arizona to Class C1 status, we have employed:

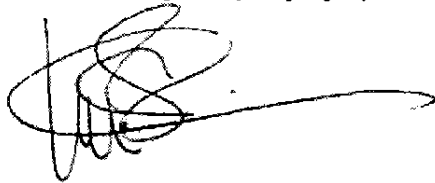
NL: 33-25-39 / WL: 111-28-03 .

Spectrum Scan, L.L.C., in its Counterproposal in this proceeding, advanced the allotment of FM Channel 222 Class A at Tusayan, Arizona. Tusayan Broadcasting filed an untimely proposal for FM Channel Class C2 at the same reference coordinates proposed by Spectrum Scan. These coordinates are the licensed coordinates of FM Broadcast Station KSGC, presently on FM Channel 221A at Tusayan, Arizona, and of which Tusayan Broadcasting is the licensee. An FM Channel Spacing Study under 47 C.F. R. Section 73.207 shows that FM Channel 222A at Tusayan, Arizona, which the *Report and Order* in this proceeding substituted for the preexisting Channel 221A there, can be upgraded to Class C2 status simply through the filing on the effective date of the Tusayan channel substitution of an FCC Form 301 application with a One-Step Upgrade request at the licensed and specified reference coordinates for Station KSGC, which are:

ENGINEERING STATEMENT cont'd page four: Petition For Reconsideration

NL: 35-58-14 / WL: 112-07-53.

The foregoing is true and correct, to the best of my personal knowledge, information, and belief, under penalty of perjury.

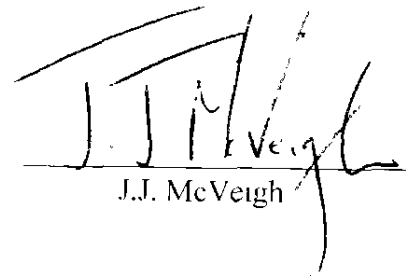
A handwritten signature in black ink, consisting of a series of loops and a long horizontal stroke extending to the right.

**Elliott Kurt Klein,
Consulting Broadcast Engineer
12 December 2003**

CERTIFICATE OF SERVICE

I hereby certify that I have, this Nineteenth day of December, 2003, sent a copy of the foregoing **JOINT PETITION FOR RECONSIDERATION** by first class United States mail, postage prepaid, to each of the following

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J.J. McVeigh